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MARRIAGE EXPENSES IN A JOINT HINDU FAMILY.

There is now a conflict of views in the Madras High Court on the question whether the marriage of a junior member of a joint family is a legitimate family purpose for which the father or managing member can lawfully alienate family properties and bind other members by the transaction. In an early case, *Ponnappa Pillai* v. *Pappuvayyangar*[1], the late Mr. Justice *Muthusami Iyer* did not recognise the marriage of a junior member as one of the purposes for which the father can make a valid alienation, as he mentioned only *Upanayanams* in the case of boys and marriages in the case of girls, "and such ceremonies as, if unperformed, would entail a forfeiture of caste or status." In a later case, *Govindarajulu Narasimham* v. *Devarabotla Venkata Narasayya*,[2] their Lordships the *Chief Justice* and Mr. Justice *Moore* held, following the earlier case "that there is no moral or religious obligation on a father to bring about the marriage of his son," and that a sale of family property to defray such marriage expenses would not bind the shares of the other sons. But in the recent case of *Kameswara Sastry* v. *Veerachariu*[3]. His Lordship Mr. Justice *Krishnaswami Aiyar* has, in a lengthy judgment in which *Abdur Rahim* J. concurs, discussed the question in its bearings on the original texts, and, disagreeing with the earlier view, has held that a mortgage by the father to borrow money for such a purpose is a valid transaction, the expense being for a legitimate family purpose. His Lordship has held that marriage is an obligatory *Samskara* on every Hindu, generally, though its omission may entail forfeiture of caste. We propose to examine the nature of a *Samskara* and make a few remarks on the grounds of the recent decision.

1. (1881) I. L. R. 4 M. 1 at p. 17. 2. (1903) I.L.R. 27 M. 206.
3. (1910) 20 M. L. J., p. 855.

A *Samskara* in the Hindu Sastras is, literally, any act which fits some particular thing for a definite purpose. Thus the pounding of grain to remove the husk, the sprinkling of the same with water, the preparation of the sacrificial post, and other rites in sacrifices, are known as *Samskaras*, as without doing such acts, the things in question are not fitted for the purposes in view. These *Samskaras* may have a visible purpose or an invisible purpose. The pounding of the grain is an example of the former; sprinkling with water, of the latter. In the case of the twice-born house-holder, the *Adhana* or preparation of the perpetual fire is a *Samskara* of that fire. Unless so prepared, it is mere lay or *loukika* fire and is useless for sacred purposes. It is also a *general Samskara*, fitting up the fire for *all* sacred purposes, instead of for a particular sacrifice or rite. As applied to living beings, *Samskaras* also imply certain acts done to the individual to fit him or his body for certain particular or general purposes. Thus 'shaving' or 'bathing in oil' is sometimes prescribed as an initiatory *Samskara* for various rites like the *Upanayana*, etc. But the principal *Samskaras* for a *dwija*, detailed in *Grihya* works, are those which fit the body or the soul of the individual for the successive acts of his life; they are usually to be performed only once in a life, and are, therefore, of the nature of general *Samaskaras*. There are as many as forty of these, commencing with *Garbhâdhâna*, or the religious ceremony of consummation of marriage, and terminating with *Smasana* or the last rite, *i. e.*, cremation after death. The first is a *Samskara* of the womb and indirectly of the future child. The last is a *Samskara* also of the individual, since proper disposal of the body is essential to free the soul altogether from its former attachments. It should be noted that the *Samskaras* from *Garbâdhâna* to *Upanayana* have to be performed for each individual by his father, though where the father dies after *Garbhâdhâna*, the others must be performed by some other relative. The essential difference between the *Samaskaras* ending with *Upanayana*, and those coming after, like marriage, establishment of the fire, etc., is that the first ones are done for the child by the others, while the later Samskaras previous to the last, *i. e.*, cremation, have to be done by the individual for himself. There is another difference between the two sets of *Samskaras*, not so important as the above, namely, that the first set prepares the individual for the second set which has no place or efficacy until the first set is performed. As a matter of practice among Brahmans, after the *Garbhâdhâna*

and *Pumsavana*, which latter is done in the 6th or 8th month of pregnancy, the later *Samskaras* are postponed and performed with the *Upanayana*, the most important of the series From a Hindu point of view, there is no difference in the obligatory character of the various *Samskaras*, as fully set out in the judgment under consideration. It is also clear that, to establish the status of a twice-born, *Upanayana* is sufficient, and marriage and the later *Samskaras* are unnecessary to secure this end. It does not follow from this that marriage is optional or unnecessary for all. It is, no doubt, an alternative course : one of the other alternatives being the adoption of the stage of *Sanyasin* directly. No Hindu can be compelled to marry, even by the head of his family or caste. But the Sastras declare that one should not be an *Anâsramin, i. e.*, unattached to a recognised *Âsrama*. The courses open to one who is a *Brahmacharin* are therefore : (1) to continue as *Brahmacharin* for life when he is called a *Naishtika Brahmacharin* ; (2) to marry and become a house-holder ; (3) to directly enter the third or the fourth stage.

The *Mimāmsa* distinguishes between two kinds of *Vikalpa* or option. One is an outright option; one is free to choose either course. The only determining factor is his will. This is usually denoted by *Vrihi Yavavad Vikalpa*, the option between rice and barley. The other is what may be called a 'conditional option' and is usually styled *Vyavasthita Vikalpa*. A grammatical instance will show the nature of this *Vikalpa* clearly. The Sanskrit word *Acharya* has two feminine forms—*Achāryāni* and *Achāryā*. Though there are two optional forms, the former alone can be used to denote the wife of an *Achāryā* or preceptor ; the latter is used when a lady who is herself a preceptor has to be denoted. Here the option is called a *Vyavasthita Vikalpa*. The distinction between the two kinds of options may be thus stated : when, with the same end in view, two different courses are prescribed, and they are independent, that amounts to a *free* option; when, on the other hand, two courses are prescribed, but there is a difference either in the ends to be achieved or in the qualifications of the individual who is expected to follow either of them, or in some point other than the mere volition of a person, we have an option of the latter kind, a *conditional* option. Thus in *Mimamsa* XII, 4, 7, referred to in the judgment, two fires are prescribed for a particular ceremony; one, the permanent fire produced by friction; the other, the fire brought from the top of a burning tree. The latter is

especially prescribed for the individual who aspires after high Brahmanic excellence, and it is decided therein that both fires should not be used, but one of them only, according to the particular end desired. In the present case, the learned Judge is of opinion that the option as to the stages of life open to a *Brahmacharin* is of the *Vyavasthita Vikalpa* kind. With great respect we would venture to differ from his Lordship on this point. It is said that, to be a *Naishtika Bramacharin*, conquest of the passions and freedom from worldly attachment is a condition precedent. But neither the *Jâbâla Sruti* which mentions the optional stages nor the text of *Yajnavalkya* (I, 49), lays down any such conditions. Of course, where a person chooses the stages other than that of a house-holder, he may be supposed to ascertain his innate tendencies, and select accordingly. But such a condition cannot be antecedent, as no one could determine for himself whether he is quite free from attachment, at that early age. The proposed condition leading neither to a different end, nor to a distinction in the antecedent qualification, cannot, we think, make the option one of the restrictive or conditional kind. And there is the distinct authority of the author of the *Mitakshara* himself for the view that the option as to the various stages after *Brahmacharya* is really of the *Aichchika* kind. In the commentary on Verses 56 and 57, *Prayaschitta* chapter, of the *Yajnavalkya Smriti*, Vijnaneswara says: "It is also open to a person to pass from the stage of a house-holder directly to the fourth stage, of Sanyâsin (*Grihad vã*). By this the author (Yajnavalkya) indicates that the *Samuchayapaksha* (the theory that the stages must be taken in consecutive order) is optional, so says the *Jâbâla Sruti*." After quoting that Sruti wherein occurs the rule "or one may become a Sanyasin directly from the Brahmacharya stage," the author states that "Gautama denies the propriety of stages other than that of the house-holder." Then he gives his own opinion as follows: "These views of *Samuchchaya*, *Vikalpa* and *Badha* being all based on (authentic) Sruti texts, there is a free option as to the various courses (*Ichchaya Vikalpah*)" and criticises, in rather strong language, the views of some persons who consider the option as *Vyavasthita*. The latter view, he says, "should be disregarded, as being the result of ignorance of Vedic study" (p. 309, Sanskrit Bombay edition). At another place, in the commentary on Verse 45 of the same chapter, the author indicates his opinion that the order as to the later stages need not necessarily be consecutive. The original is: "One should enter the stage of a forest

dweller, leaving his wife in charge of his son or accompanied by her." Vijnaneswara says: "This is said, adopting the *Samuchchaya* view; but there is also the view that one may enter on forest-life without becoming a house-holder, under the text 'without loss of Brahmacharya (chastity), one may take up any (stage) that he likes.'" Thus it is clear that Vijnaneswara favoured the view of *free option* as to the various *Asramas* and did not consider it compulsory on any one to take them up in consecutive order. The various views as to the orders are also fully explained in the judgment of Mr. Justice *Chandavarkar* in *Sundarabai* v. *Shiv Narayan*[1]; but his Lordship too, is, we think, inaccurate in stating that the *Mitakshara* follows *Yajnavalkya* and *Manu* in adopting the *Samuchchayapaksha*. As we have seen, the sage *Yajnavalkya* himself countenanced the *Vikalpa* or free—option view. We thus see that nothing is needed as a condition for the adoption of any one of the three future courses prescribed for a twice-born *Brahmacharin*, except his free volition or inclination. based, it may be, on an examination of his own nature and tendencies. We must therefore admit that marriage, as a *Samskara* for a twice-born Hindu, has *two* characteristics not possessed by *Upanayana* and other earlier *Samskaras*:(1) that every individual has to do it for himself and cannot have it done by others; (2) that it is so far optional; that an individual, by his mere choice, need not pass through it, but may follow any of the other alternative courses mentioned before, without question by society or compulsion by law. The obligation to marry is certainly not legal; it is in fact less compulsory than in the case of one married and losing one's wife, who is in the eye of the Sastra, without *Asrama* till he takes a second wife. If Hindu law and society can tolerate a widower, it can certainly allow one not to marry, if one chooses to continue as a Brahmacharin till death, or professes to become a hermit or *Sanyasin* directly. As delay in entering the married state is expiable by penance, so are lapses from strict Brahmacharya expiable also. It is, therefore, this optional character of the marriage *Samskara* that justifies the proposition that if there is no patrimony, the marriage of a poor unmarried brother is not compulsory on the others. If marriage were in all respects like *Upanayana*, it is difficult to see why there should not be the same compulsoriness; if it is only a *Vyasvasthita Vikalpa*, such a marriage should not be neglected unless the other brothers are

1. (1907) I.L.R. 32 81.

assured of the unmarried brother's absence of attachment —a condition which can never be presumed. On the other hand, marriage being optional, and poverty being sufficient excuse for inability to enter that state, the other brothers not burdened with a patrimony incur no sin and violate no legal duty in neglecting to get him married.

We have now to consider how the existence of the two characteristics, explained above,in the case of marriage as a *Samskara* affects the question whether the father or managing member is justified in incurring a debt for the performance of such a ceremony by alienating family property. The first of these characteristics shows that the manager will incur no sin personally if he omits to get the junior member married. There is no religious duty cast on him to perform any ceremony for the junior member beyond *Upanayana*. His religious responsibility is not greater than when the younger member omits to perform his *Sandhyas*, or neglects the obsequies of his wife, if she should die, or fails to perform *pumsavana* for his pregnant wife at the proper time. Is there then a moral or legal obligation on the managing member to supply funds for such a purpose as marriage or to get the marriage performed when the other member is a minor? The answer has to be obtained from a correct interpretation of the *Mitakshara* text containing the words "*Avasyam kartavyeshu pitri sradhadishu.*" The full text, when translated, runs as follows: "While the sons and grandsons are minors, and incapable of giving their consent to a gift and the like; or while the brothers are so and continue unseparated; even one person, who is capable, may conclude a gift, hypothecation, or sale of immoveable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or *indispensable duties, such as the obsequies of the father or the like*, make it unavoidable." The portion in italicsis Colebrooke's translation of the Sanskrit words quoted above "*Avasyam*, etc." It has to be seen that this sentence which is Placitum 29 in Mitakshara I (Stokes, 376) is stated to be the author's explanation of the text (of Brihaspati) in Placitum 28, which says: "Even a single individual may conclude a donation, mortgage or sale of immoveable property, during a season of distress, for the sake of the family, and *especially for pious purposes.*" This text is itself stated to be an exception to the rule in Pl. 27, wherein it is stated on the authority of two texts (of Vyasa), that the father has independent power over moveables only for certain indispensable purposes, but is subject

to the control of the sons in regard to immoveables. The result of the general rule in Pl. 27, and the exception in Pl. 28, as interpreted in Pl. 29, is that the power over immoveables also is recognised by the *Mitakshara* for the purposes mentioned in that placitum, which are practically the same as the purposes described in Pl. 27. as justifying the alienation of moveables, where the words used are "*pitür āvasyakēshu dharma krityeshu*, etc," translated by "for indispensable acts of duty and for purposes prescribed by text of law as gifts through affection, support of family, relief from distress, and so forth." In other words, Vijnaneswara extended the power over immoveables on the analogy of the power over moveables: 'The *pious* purposes' in Pl. 28 "*dharmarthé*" are restricted by him to certain specified purposes in both cases, at Pl. 27 and at Pl. 29. Though Pl. 27 mentions only the father, Pl. 28 says simply "even one" and the commentator applies the whole exception to the case of the father as well as the brother, managing the family. Therefore, the first point to notice is that the limits of that power of alienation in question in no way depend on the peculiar position of the father or the pious duty of the son towards his debts.

The whole question, as mentioned already, depends upon whether the words '*or the like*' in Pl. 29 can be legitimately extended to the marriage of a junior member. It must be borne in mind that in the preliminary discussion in the *Mitakshara* on the nature of ownership, a discussion into which every commentator has entered with considerable zeal, the opponents to the birthright theory ask, at Pl. 18: 'If property were vested by birth in the sons, the estate would be common. How then is the father competent to maintain the sacrificial fire and perform other religious duties which are accomplished by the use of wealth?' To this Vijnaneswara replies in Pl. 26: "As for the alleged disqualification for religious duties which are prescribed by the Veda and which require for their accomplishment the use of wealth, sufficient power for such purposes is inferred from the cogency of the precepts (which enjoin their performance)." The meaning and the *Mitakshara* is that, in spite of the right-by-birth theory, express texts create exceptions to it, when they enjoin on the father (and other members) particular religious duties for whose performance wealth is required. As the author of *Viramitrodaya* neatly retorts (I, 23, p. 13, Sarkar's translation): "If the right of sons is only on the death of the father, the sons, having no property, would be incompetent

to perform the ceremonies enjoined on themselves and would thus violate the Sruti, of general application, that 'one who is black-haired and to whom a son is born shall establish the sacred fires.' Thus, in either view, express texts must be recognised as exceptions."

It is this idea of implied exceptions by texts that is expanded in Placitum 29 of the *Mitakshara.* Three general classes are mentioned as justifying alienation, namely, calamity, family benefit and indispensable duty, or, duties that must be necessarily done (*Avasyam kartavya*). These are independent *genera.* In the last genus of necessary duties, we have one species mentioned, *i.e.*, father's obsequies. The question is whether the wide expression "*or the like*" (*Adi*) as translated by Colebrooke, or, "*and others*" as would certainly be the better translation as pointed out in the judgment, should not be limited to duties of the same class as the one specified. The doctrine of *ejusdem generis* is certainly applicable to cases of this kind, unless no genus can be discovered from the particulars, or the particulars mentioned have exhausted the genus.[1] Here the genus is mentioned (*Avasyam kartavya*), and therefore 'the others' must be *ejusdem generis* with it. It is this point that weighed with Sir *Muthusami Iyer* J. when he said in *Ponnappa* v. *Pappuvayyangar*[2] "the phrase 'the like' in para 29, both by Hindu Law and *the rule of construction*, refers to * * such ceremonies as, if unperformed, would entail a forfeiture of caste or status." The words '*necessary* duties' describe the genus. '*Necessary*,' which we have seen is a more correct translation than '*indispensable*' in the context, does not mean entailing a forfeiture of caste when unperformed. If 'necessary' means obligatory on the manager, it may include *Upanayanams* and marriage of girls, but not the marriage of the junior members. It would also fail to include purposes like the *adhana* or establishment of the sacred fire, etc., by the junior members, the very purposes to which the objection in Pl. 18, the

1. *Lyndon* v. *Standbridge* (1857) 2 H. and N. 45 at p. 51.
Lambourn v. *McLellan* : (1903) 2 Ch. 268; *Fenwick* v. *Schmalz* : (1868) 3 C. P. 313. Maxwell on *Interpretation of Statutes*, 4th Ed. pp. 499, 507 509, *et seq.*
2. (1881) I. L. R. 4 M. 1.
Underhill and Strahan's *Interpretation of Deeds and Wills*, 2nd Edn. pp. 23-27.

answer in Pl. 26, and the retort in *Viramitrodaya* I, 23, refer. We think the phrase 'necessary duties' includes all religious duties performable by each member under Vedic injunction, though their non-performance does not entail forfeiture of caste and though they are not obligatory in the sense that no other course is freely open to him. Thus marriage is a religious duty performable by each member, when he does not elect, of his own free choice, to remain a celibate (*naishtika*) or adopt one of the later Asramas.

Such a ceremony, then, is necessarily enjoined on him, and though others are not interested in it directly, it is analogous to a purpose conferring common benefit. *The father's obsequies* are mentioned as an illustration of this class. In a family of a father and sons, the sons are not interested in the ceremony performed by their father for *his* father; they themselves are not bound to do it as long as the father is alive. Still, being a ceremony enjoined on the father by Vedic injunction, the expenses bind the sons, though they do not consent to it or are too young to be consulted. Similarly, where the family consists of joint brothers, any purpose of a member which amounts to a duty enjoined on him, is a legitimate family purpose as it will come under the class of 'necessary duties.' In fact, the obligation on the manager to contribute to such expenses arises from the fact that he controls the common funds and that the purpose is one enjoined by the Sastra on the other member. Where the other member has to be married, and being grown up, is willing to be married, the managing member has positive intimation of the fact that he does not elect any of the other optional courses open to him. Even when the member to be married is a minor, since marriage of such a minor is the general practice of the community, the manager has to presume that marriage is the course which the junior will adopt, and bring it about by the expenditure of common funds. Where the money has to be raised by mortgage or sale, the text of the Mitakshara, in Pl 29, justifies his act, and the other members, whether minors or non-consenting parties, are perforce bound by it. Of course the actual amount spent and the scale or standard adopted must be suitable to the rank and circumstances of the family. If 'necessary duties' are only those that, when unperformed, entail forfeiture of caste, it will be difficult to justify the expenditure, common in Hindu households, for purposes

like the birthday of younger children, the *Aksharabhyasam*, the consummation of marriage by a male member, etc., which are universally held to be justifiable purposes, though they are not covered by actual decisions.

Moreover, the marriage of a girl being a necessary *Samskara* for her, in the place of Upanayana, Justice *Muthusami Iyer*, has rightly included it among the 'indispensable duties' in his remarks in *Ponnappa* v. *Pappuvayyangar*.[1] It follows that the decision of their Lordships *Davies* and *Bhashyam Iyengar* JJ. in *Sundari Ammal* v. *Subramania Iyer*[2] is not good law. The father incurs sin in not getting his daughter married in time, and the obligation on him to have the marriage done cannot be less than the obligation of a married brother without patrimony to get his poor younger brother married. Even supposing that a father without ancestral property is under no legal obligation, one with such property, and after his death, his son, are certainly bound to provide for the marriage of the girls in the family. The right of sisters to a share in the ancestral property as laid down in *Yajnavalkya* (II, 124) and the *Mitakshara* (I, vii, 5—14) specially discountenances the view which, however, the Courts have now adopted, that the 4th share is only symbolic of a marriage provision (Placita 10, 11). Though daughters have no legal right to a share as long as the father lives, their right to maintenance is undisputed, and their right to have the marriage performed by the father must also exist. The Mitakshara says that brothers must give a share to the sisters, as "they who refuse it shall be degraded." It is difficult to conceive how a father can escape liability for the performance of his daughter's marriage, on any scale that his means will allow. Again, the expenses for the nuptials of a sister which are held to be justifiable are held so really because they are 'necessary duties' in the sense of duties enjoined at least by long custom, than because they are part of the *marriage Samskara*, though that is the theory. It is in accordance with these principles that the Calcutta High Court has recently held in *Charaman Sahu* v. *Gopi Sahu*[3] that the widow in possession of her husband's estate may validly give a reason-

1. (1891) I. L. R. 4 M. 1. 2. (1902) I. L. R. 26 M. 505.
1. (1909) I. L. R. 37 C 1.

able portion of the estate as a marriage portion, and the test of reasonableness is based on this very right to a share laid down in the *Mitakshara* texts (I, vii, 5-14) referred to above, and they have, in accordance with Hindu notions, held that the gift may be made, after the marriage, at the time of the *Gowna* or *Dwiragamana* ceremony, as it is called in Bengal, corresponding to the nuptials or consummation of marriage in these parts. No doubt it is the widow that is the giver in this case, but there is no justification for the distinction made in *Sundari Ammal* v. *Subramania Iyer*,[1] that the duty to pay for marriage expenses attaches only to one succeeding by survivorship or inheritance. We must take it that in the Calcutta case, the widow is only carrying out a duty which would have been obligatory on the sons, if there were any, in the sense of its being a duty sanctioned by custom and justifiable under the express text of the *Mitakshara*. The decision in *Kamakshi Ammal* v. *Chakrapani Chettiar*,[2] as explained in the Calcutta case, only holds that a gift of a *considerable* portion of property by a managing member is invalid. *Ramasami Ayyar* v. *Vengidusami Ayyar* [3] is authority for the position that not only the actual marriage expenses but gifts of land by way of *bhoo-danam*, can be supported as valid under the *Mitakshara* texts I, vii, 5-14. They would also, therefore, be legitimate family purposes, being in the discharge of enjoined duties which is all that the phrase '*Avasyam kartavyeshu*' can mean. Of course the precise point in *Sundari Ammal's* case[1] is not touched by these decisions, but if a father has a right to spend money for the marriage of his daughter or even gift lands in connection with the marriage without the consent of junior members[4] it would be strange if he has not the duty to get such marriage performed when he has wealth sufficient for the purpose. The Hindu Law is seldom concerned with any *rights* which are not, in some aspect, *duties*. And we can conceive of no harm or difficulty in holding that the marriage of a daughter is an enforceable obligation on the father, under Hindu Law. But whatever may be the sound view with regard to the duties of a father in the marriage of his daughters, we have no

1. (1902) I. L. R. 26 M. 505. 2. (1907) I. L. R. 30 M. 452.
3. (1898) I. L. R. 22 M. 113.
4. *Kudutamma* v. *Narasimha Charulu* : (1907) 17 M.L.J. 528. See also I.L.R. 18 A. 474, 537.

doubt, if we may say so with respect, that the learned Judge, in the judgment under discussion, has rightly disagreed with the view in *Govindarajulu* v. *Devarabotla*[1] and held, *contra*, that the marriage of a male member is a legitimate family purpose, and that an alienation for that purpose by the father is perfectly valid. As Justice *Chandavarkar* has remarked in *Sundara Bai* v. *Shivanarayana*[2] the proposition laid down in the former Madras case, that the marriage of a co-parcener is not a family purpose, is a startling one, and we are glad that the recent judgment has taken a view as to the rights of the manager which will meet with the full concurrence of the Hindu community in general, and the profession in particular.

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SUMMARY OF ENGLISH CASES.

Galbraith *v.* Grimshaw. [1910] A. C. 508.

Attachment order of Scotch Court on property in England—Subsequent order in bankruptcy in Scotland—Effect of.

On a decree obtained in Scotland an order of attachment on the goods in England of the judgment-debtor was served on a person holding the goods on behalf of the judgment-debtor. Subsequently an order in bankruptcy was made in Scotland declaring the judgment-debtor a bankrupt and vesting his assets in his trustee in bankruptcy.

Held—According to the Scotch law of bankruptcy the attachment being prior in date prevailed against the subsequent order in bankruptcy.

Gordon-Cumming *v.* Holdsworth.

[1910] A. C. 537.

Sale of estate named as per plan—Inaccurate particulars—Concluded contract—Plan alone the guide.

Although a conveyance of a certain estate by naming or describing it in a particular way would be a valid conveyance of all lands that were usually comprised under such a name or description, yet, if the parties had concluded a contract of sale of a

1. (1903) I. L. R. 27 M. 206. 2. (1907) I. L. R. 32 B. 81 at p. 95.

certain estate which bears a certain name, *as per plan annexed*, no more extent than what would be comprised within the boundaries given in the plan can pass to the purchaser. In such cases the plan alone is the material to guide ; if there be any misrepresentations as to the extent, etc., in the particulars given of what is contained within the boundaries given in the plan, that may be a ground for rescinding the contract, or for entitling the plaintiff to an allowance, but where the action is not for rescinding the contract, but for recovering more extent of land than what would be covered within the boundaries given in the plan, on the ground that that also passes by the sale owing to the extent, etc., given in the particulars, the plaintiff cannot recover the same as the contract was as per plan.

Per Curiam.—It is not enough for the parties to agree in saying, that there was a concluded contract if there was none, and then to ask a judicial decision as to what the contract in fact was. That would be the same thing as asking the Court to make the bargain; whereas its sole function is to interpret it.

The meaning of a descriptive name in a particular contract cannot be determined by a fixed rule of law, without regard to the facts of the case.

Reid-Newfoundland Co. *v.* Anglo-American Telegraph Co. [1910] A. C. 560.

Contract—Construction—Exclusive right of entry for promisee for certain purposes—No prohibition for promisor doing something in his own lands.

A Railway Company entered into a contract with a Telegraph Company by which the latter were allowed "the exclusive right to enter upon the lands of the Railway Company and to build, erect, maintain and operate upon and along the Railway as many telegraph lines as may be necessary for their own purposes and a special wire for the purposes of the Railway Company, their servants and agents, etc."

The Railway Company, after this contract, extended its lines for which they claimed that the Telegraph Company must furnish a special wire as per contract. This claim was negatived by the Privy Council in a previous litigation on the ground that

the duty to supply a special wire had reference only to the state of the Railway as it existed at the date of contract. Then the Railway Company itself put in a special wire for their own use for the old as well as the new portions of the Railway.

Held—That the Telegraph Company had no right under the contract to prevent the Railway Company from erecting the special line.

Per Curiam.—The 'exclusive right' of the Telegraph Company was not an exclusive right of entry, for the Railway Company was in possession already for its own purposes; the exclusive right was to enter for the purpose of erecting, maintaining etc., telegraph lines for the business of the Telegraph Company. This does not exclude the right of the Railway Company to erect and work telegraph lines on its own property for the purposes of its Railway business.

Laughton *v.* Port Erin Commissioners.

[1910] A. C. 565.

Contract to sell land to a public body—'Indirect' interest of one member of the public body—No rescission of contract by the public body—Plaintiff's complaint about delay in completion—Specific performance.

(1) A section of the Local Government Act prohibited any member of a local body who was 'concerned' in any matter from taking any part in debates or resolutions concerning that matter. The father of one of the Commissioners was the owner of a piece of land. A land adjoining this was resolved by all the Commissioners to be bought from the plaintiff for a certain price as a pleasure or recreation ground for the public of the place and a contract was concluded.

(2) The Commissioners delaying the completion of the sale on account of their unwillingness, the plaintiff wrote to them two letters, the second being a year after the first; the first to the effect that if the contract was not completed by the time agreed on he would not consider himself bound by the agreement but that he would dispose of the land as he thought fit; the second letter to the effect that he was sorry that by the most vexatious delay of the Commissioners he had lost interest on the sale amount and that he would not consent to extend the time agreed for completion.

In a suit for specific performance:—*Held* (1) that the argument founded on the so-called 'concern" of one of the Commissioners was far-fetched; (2) that by the two letters the plaintiff, far from indicating an intention to determine or avoid the contract, showed that he insisted on its strict performance, and (3) that the plaintiff was entitled to specific performance under the circumstances, there being also no determination of the contract by the defendants.

Per Curiam.—The interest which the Commissioner, the eldest son, had in the properties of his father who was advanced in years and likely to die soon and the likelihood of the father's adjoining land rising in value if the proposed land was purchased and laid out as a pleasure ground would not create even an "indirect" 'concern' within the meaning of the section.

Natal Bank, Ltd. *v.* Rood. [1910] A. C. 570.

Conveyancing Law—Settled construction of words—Rule to be adopted.

When a construction in conveyancing law has become locally settled, then it is of especial importance that ideas foreign to and subversive of the adopted interpretation should be avoided.

Obiter.—If in a locality it had become the settled rule that a certain word such as 'disponee' must be used in order to create a valid *donatio mortis causa*, that rule must be adhered to although it might be a very technical view. This was the unanimous view of the House of Lords in a previous case as to the binding nature of such locally accepted practice.

J. C. Thompson v. Equity Fire Insurance Coy. [1910] A. C. 592.

Fire Insurance Policy—Exemption from liability while gasoline is "stored or kept" in the building insured—'Stored or kept'—Meaning of.

A Policy of Fire Insurance contained an exemption from liability if the fire occurred in the building while gasoline is stored or kept in the building insured. A small stove containing gasoline was being used for cooking on certain occasions. On the

occasion in question the stove contained one pint of gasoline and was kept in a portion of the building without proper precautions when it caught fire which extended to other parts of the building.

Held—That the exemption clause will not relieve the Insurance Company from liability as the gasoline cannot, in the ordinary meaning of the words, be said to be 'stored or kept.' The words 'stored or kept' are common English words with no very precise or exact signification. They have a somewhat kindred meaning and cover very much the same ground. The expression seems to point to the presence of a quantity not inconsiderable or at any rate not trifling in amount, and to import a notion of warehousing or depositing for safe custody or keeping in stock for trading purposes. If the words 'stored or kept' are not to be given this meaning at all, the exemption clause could easily have said merely 'while gasoline is in the building.' The small quantity which was in the building for consumption cannot be said to have been 'stored or kept' in the building.

Montreal Light, Heat & Power Co. *v.* H. B. Sedgwick.

[1910] A. C. 598.

Marine Insurance—Insurance against total loss by total loss of vessel—Total loss of articles by practically total loss of vessel—Liability.

Several barrels of cement were insured against 'total loss' by 'total loss' of a barge in which they were conveyed. The barge became almost a wreck and all the barrels of cement becoming wet the cement became stones and thus the cargo became a 'total loss.' In an action for recovery of the amount insured for, the owners of the barge pleaded that the liability was only in the event of the loss occurring by the total loss of the barge.

Held—That the event, *i.e.*, total loss of cement, contemplated had happened; the question whether the barge was a total loss or whether it was almost a wreck and whether under the circumstances a prudent owner would spend money to save it or not was beside the issue, as that was not the consideration with which the parties could be said to have entered into the contract.

Brown v. Dean. [1910] A. C. 373.

New Trial—Jurisdiction to grant—Principles governing.

When a litigant has obtained a judgment in a Court of Justice, whether it be a County Court or one of the High Courts, he is by law entitled not to be deprived of that judgment without any solid grounds, and where the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive. Where a Judge has disregarded those principles and has granted a new trial on affidavits which show at the outside that there will be oath against oath on a new trial—and that is clearly not enough —which show nothing in the nature of surprise, fraud or conspiracy and which also state nothing to show that the information alleged could not with reasonable diligence have been obtained in the first trial, the fact that the Judge came to the former conclusion of fact with hesitation and that the matter was serious for the defendant in consequence of his position are not sufficient grounds for granting a new trial. The words that the Judge is entitled to grant a new trial " if he shall think just " do not give him an arbitrary discretion but only a judicial one.

Bellerby v. Heyworth. [1910] A. C. 377.

Statute—Preamble—Purpose of.

Per Lord Loreburn L. C.—I look at the preamble of the Act not for the purpose of controlling the wording of the section but to explain the purpose of the Act.

Butterley Co., Ltd. v. New Hucknall Colliery Co., Ltd. [1910] A. C. 381.

Mines—Upper and lower strata of coals—Working both by different people—Subsidence of upper strata—Right of support—Contract—Necessary implication.

One owner of two strata of coals, one above the other first let the working of the lower one to *A* and then of the upper one to *B*. While both strata of coals were being worked simultaneously the upper one subsided and in an action by *B* for an injunction to restrain the working of the lower one in such a manner as to cause subsidence: *Held* that the suit must be dismissed for—(1) when the contract of lease of the upper strata was made both parties knew that both strata would be simultaneously worked and worked under a system known as *the long wall* system

which according to experience and approved methods of working was the best known; (2) the contract provided for damages in case of subsidence, and (3) a *necessary implication* arose under the circumstances of the contract and the plaintiff submitted himself to such a contingency arising from the working of the lower stratum.

Per *Lord Macnaghten*.—In order to displace the common law right of support there must either be an express permission or clear implication. It would be difficult to imagine a case in which permission to withdraw support could be more clearly implied than it is in the present case.

Obiter.—A private act of Parliament is really no more than an agreement between the parties to it, sanctioned by the legislature, and in order to construe that agreement, we may look at the surrounding circumstances at the date of it.

Lord Llangattock *v.* Wotney, Combe, Reid and Co. Ltd. [1910] A. C. 394.

Act — Imperfections — Construction — Unexpired term — Meaning of.

Where an Act, which is imperfect in its language and does not provide for all contingencies, is capable of producing obvious hardship and unreasonable results, whether the construction of the plaintiff or defendant be adopted, it is the duty of the Court to interpret the language as it is and give legal effect to legal language. "Unexpired term" of a lease means the time during which a lease in possession will run but not the time for which leases in reversion may be given.

Grant *v.* Owners of S. S. "Egyptian." [1910] A. C. 400.

Negligence—Damage—Natural and probable consequences—Liability for costs.

Plaintiff's servant employed to be in charge of plaintiff's trawler then in dock agreed without knowledge or permission of the plaintiff to take charge of defendants' trawler in the same dock. This servant so navigated the defendants' trawler as to cause collision with that of the plaintiff. A hole was thus caused in plaintiff's trawler which if it had been attended to in time would have saved it. But owing to the neglect of this

servant to inform the plaintiff of the same in time the trawler sank. In a suit for damages for the loss of the vessel :

Held, that the defendants were not liable for the loss of the vessel which was not the natural and probable consequence of the collision for which they were responsible and which caused only a hole. The fact that the defendants decoyed the plaintiff's servant is immaterial, but it is a good ground for depriving them of their costs though they succeeded as regards their liability for sinking the vessel.

Catt *v.* Wood and others. [1910] A.C. 404.

Friendly Society—Rules—Ultra vires—Arbitration—No misconduct—No setting aside.

Rules framed by a Friendly Society under powers conferred on it by an Act of Parliament which created it are not *ultra vires* when they are part of the necessary, or at all events the permissible, machinery to preserve harmony in the working of the society. A section of the Act governing the society having provided for arbitration by the governing body of the society in case of disputes between the society and its members :

Held that a decision of such governing body as arbitrators is not questionable in a Court of Law except for misconduct (misconduct in its technical sense) even if the arbitrators have gone wrong on a point of law. It is most necessary that we should obey loyally the enactments which are made in order to prevent multitudinous litigation and to give effect to decisions (if they be honest and not open to a charge of misconduct) of those who are deciding rightly or wrongly within the jurisdiction which is confided to them by the laws of the country.

Thompson *v.* Goold & Coy. [1910] A.C. 409.

Act—Construction—Plain words—Considerations of policy.

Where an Act of Parliament (Workmen's Compensation Act) does not actually require that a person injured should claim a particular sum as damages he is entitled to make a simple demand for damages without mentioning the amount. The fact that it will embarrass the employers if no sum is mentioned in the claim, in not being able to know whether to settle or dispute the claim, is no ground for holding that the plaintiff must name a specific sum. Considerations of policy ought not to enter in the construction of statutes unless there is a clear necessity. It is a

strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do. There may be reasons why the Act has not made it necessary to specify a definite sum, such as ignorance or incapacity of the injured person at the time of the demand or at any other time as to the real extent of the injury suffered by him.

Kirkwood *v.* Gadd. [1910] A.C. 422.

"Carrying on Business"—Meaning of.

The Money-lenders' Act, 1910 (64 and 65 Vict., C. 51) S. 2, Sub-S. (*b*) required that the mony-lender shall carry on business only in his registered address and nowhere else and only in his registered name. Some portions of the transactions of a money-lender connected with his taking a bill of sale of some property took place at the borrower's private residence. *Held* that the sale is not illegal on that account, the object of the Act being to preserve the identity of the money-lender so that the borrowers might always know with whom they are dealing, to defeat the frauds and to correct the abuses which would attend the business if there be a changing name and shifting address.

The Act was not passed either to hinder or to prevent money-lending as a business. What is "carrying on business"? It imports a series or repetition of acts. Each separate piece of business may consist of many stages and incidents and the business as a whole comprises many separate pieces.

The Act cannot mean that every stage and every incident of every piece of the money-lending business is to be transacted at the registered office. That would be impossible, for such things as making inventories or taking possession of furniture under a bill of sale are part of the business and must be done where the goods are situated. Whether a particular transaction was carried on at the registered address or not is always a question of act.

White *v.* Victoria Lumber and Mfg. Coy. Ltd.
[1910] A. C. 606.

Workman's Compensation Act—Death of Railway Engineer —Contributory Negligence—Misdirection to Jury—Question of misdirection raised newly before the Privy Council—Practice.

In this case the defendants, who for the first time argued before the Privy Council that the trial Judge erred in law in directing as he did on the point of contribntory negligence

were not allowed by the Privy Council to do so on the ground that the misdirection, if any, was not pointed out to the trial Judge when there was an opportunity; that it was not pointed out either in the grounds of appeal to the lower Appellate Court and that it was not even argued in that appellate Court.

Burchell. *v.* Gowrie & Block-House Collieries Ltd.

[1910] A. C. 614.

Principal and Agent—Commission on sale of property.—Agent procuring purchaser at certain rates—Principal selling property to that purchaser behind agent's back and on different terms—Agent's right to commission.

If the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him. In other words the plaintiff, *i.e.*, the agent, must show that some act of his was the *causa causans* of the same, or was an efficient cause of the same. If an agent brings a person into relation with his principal as an intending purchaser, the agent has done the most effective and possibly the most laborious and expensive part of his work, and if the principal takes advantage of that work and, behind the back of the agent and unknown to him, sells to the purchaser thus brought into touch with him on terms which the agent theretofore advised the principal not to accept, the agent's act may still well be the effective cause of the sale.

There can be no real difference between such a case and those cases where the principal sells to the purchaser introduced by the agent at a price below the limit given to the agent.

No duty lies upon an agent to communicate to his principals proposals which those principals had in effect informed him could not and would not be accepted. Wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay, is liable to the party who is to receive the money, if he does any act which prevents or makes it less probable that he should receive it.

Eke *v.* Hart-Dyke. [1910] 2 K. B. (C. A.) 677.

Workman's Compensation Act—Injury by accident—Meaning of.

Where the death of a workman employed as a gardener was caused by ptomaine poisoning from sewer gas being inhaled or absorbed into his system :

Held, in a suit for compensation by the widow on a construction of the words 'injury by accident,' that she was not entitled to recover compensation.

Per *Cozens-Hardy* M. R.—"Except in the case of industrial and scheduled deceases, unless the applicant can indicate the time, the day, and circumstances and place in which the accident has occurred by means of some definite event, the case cannot be brought within the meaning of the Act and does not entitle the workman and his dependants to compensation."

In re **John Tweddle & Company, Limited.**

[1910] 2 K. B. (C. A.) p. 697.

Company—Winding up—Receiver liquidator—Fraud—Public examination of persons charged—Persons exculpated—Costs—Jurisdiction to order Official Receiver to pay costs personally.

A Company was ordered to be wound up and the Official Receiver was appointed liquidator. He in his report stated that certain persons named in the schedule to the report committed fraud in the promotion of the Company, one of whom was the appellant, a director of the Company. Upon the report, the Judge ordered the public examination of the persons named. After the examination the appellant applied for an order exculpating him, which was opposed by the Receiver. The Judge nevertheless, passed an order exculpating him and directed the Official Receiver to pay the costs personally of both the examination and the application, there being no available assets of the Company.

Held.—That, so far as the public examination was concerned, the Official Receiver was merely discharging a statutory duty and the Judge had no jurisdiction to order him personally to pay the costs.

Held, also that as the Official Receiver accepted the position of a litigant he was a party to the proceedings and the Judge had jurisdiction to order him to pay the costs of the application for exculpation.

In re **Aktie Bolaget Bohertfors and La Societie Dc. Rapeteries Dc. L'AA.**

[1910] 2 K. B., p. 727.

Arbitration—Practice—Jurisdiction—Service of notice of motion on foreign Company out of jurisdiction, in France.

In an a agreement entered into in France between the respondents, a foreign Company carrying on business in Sweden, and the appellants, a Company carrying on business in France, it was provided that in the event of any dispute arising under the agreement the same should be submitted to arbitrators to be appointed by each party or to an umpire appointed by the arbitrators, An award was made against the respondents by an English umpire. The respondents elected a French domicil. Leave was granted to the respondents to serve on the appellants who were out of the jurisdiction a notice of motion to set aside the award.

Held, that the Court had no jurisdiction under Order XI, rule 8. A. to grant leave for service outside the jurisdiction upon parties domiciled abroad of a notice to set aside an award.

Crighton and Lawcar and General Insurance Corporation, Ltd. [1910] 2 K. B. 738.

Arbitrator—Delivery of pleadings—Power to allow amendment.

An arbitrator can, in the exercise of his discretion as a Judicial Officer, allow amendment of pleadings delivered to him by the parties under directions.

Bath *v*. Standard Land Coy. [1910] 2 Ch. 408.

Principal and Agent—Company—Directors doing work in their individual capacity—Not entitled to charge remuneration.

The rule of law that prohibits an agent from making any profit for himself beyond the remuneration fixed in the contract also prohibits individual directors of companies from taking any remuneration for work done in connection with the agency work undertaken by the company, though if the work done by the director were done by a stranger, the company would certainly have been entitled to charge the remuneration paid to him against the principal. Articles of association allowing contracts to be made between the board and their own members have no bearing on the dealings of any third person with the company for the obvious reason that the third person dealing with the company is not a party to the contract contained in the articles of association.

In re **Barrance: Barrance *v.* Ellis.** [1910] 2 Ch. 419.

Codicil—Effect of admitting probate—List of names with sums of money against each name.

When a docoment has been admitted to probate it is the duty of the Court which has to construe the document to assume that the document is a testamentary document. A codicil containing a bare list of names with sums of money mentioned against each name, was construed in this case as a gift to each of the sum so mentioned.

In re **British Power Traction and Lighting Company, Limited.** [1910] 2 Ch. 470.

Receiver—Sureties—Right of indemnily — Creditors and sureties, between—Liabilities inter se.

In a debenture-holder's action, one *W* was appointed receiver and manager and gave security by a bond with sureties. In carrying on the business, he received certain moneys and incurred certain liabilities which were not paid. On taking accounts, it was found out that the moneys in hand were £ 400 short. It was also found that the liabilities incurred were properly incurred and, if paid, would give the receiver right to be indemnified to the extent of £900. But under the law, the creditors would be entitled to proceed against the estate only to the extent of £ 500. Under these circumstances the question was as to who was to bear the loss of £ 400—the sureties or the creditors? *Swifen-Eady* J. held that the loss was to be borne by the sureties and not the creditors. The creditors could have no higher right against the sureties than as against the estate.

In re **United Provident Assurance Company.** [1910] 2 Ch. 477.

Companies Act, 1908—*Class meetings—Fully paid up share-holders—Partly paid up share-holders, with unpaid balances advanced.*

Fully paid up share-holders form a different class from partly-paid up share-holders with the uncalled balance paid in advance of calls and bearing interest, for the purpose of class meetings summoned in a winding up to approve a scheme of arrangement under S. 120 of the Companies (Consolidation) Act, 1908.

JOTTINGS AND CUTTINGS.

Contempt of Court.—The numerous cases of Contempt of Court which have recently been dealt with by the Judges have induced the President of the Institute of Journalists to propose that such cases should be tried by Juries. It is a proposal with which few persons cognisant with the history and character of the offence will agree. The late Lord Selborne, when he introduced, in 1883, a Bill to amend the law relating to Contempt of Court, rightly observed that "Judges must have the power of summarily vindicating their authority." To introduce trial by Jury in such cases would be to place the protection of that authority in the hands of men less capable of understanding its importance. There are, however, other directions in which the law relating to Contempt of Court might usefully be altered. Lord Selborne, whose Bill was introduced while he was Lord Chancellor, proposed that the unrestricted power of punishment possessed by the Judges should be limited; he proposed to limit every sentence of imprisonment to a period not exceeding three months and the power of fining to £500. Nine years later a Bill was introduced into the House of Commons to give a right of appeal in contempt cases. This Bill was backed by, among others, Mr. Augustine Birrell, Sir Herbert Cozens-Hardy, Mr. Justice Coleridge, and Sir Robert Finlay, but, like the Bill introduced by Lord Selborne, it was not proceeded with. It is hardly possible to deny that it is anomalous that the Judges, in dealing with an offence which is practically against their own authority, should possess an unlimited power of punishment, and that the persons whom they summarily deal with should have no right of appeal. In these directions, rather than in the introduction of trial by Jury, those who feel aggrieved by the present law as to Contempt of Court may legitimately seek to amend it.—*The Law Journal.*

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The Duplication of Criminal Inquiries.—Our protest against the evils of repeated hearings in criminal cases—evils not confined to the accused, but felt also by the witness, and extending now to the general public—has received added weight and authority by the accumulation of opinions of experts on the subject which we present in another column. It is not the first time, of course,

that the scandal of agonies long drawn out in inquiries begun before the Coroner, repeated in the Magistrates' Court, and again dealt with twice over—before Grand and Petty Juries—on the actual trial, has shocked the public conscience. The frequent recurrence of such scandals led to the appointment of the Home Office Committee on Coroners, which reported this year, recommending large modifications in the existing practice. Nothing has been done on the recommendations, because of the necessity of legislation to alter a procedure—or rather concatenation of procedures—accumulated without method in the course of centuries to meet conditions of society very different from those in which we live.—*The Law Journal.*

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The Danger to the Community.—The modern community does not require, either for its protection as a whole or for the safeguarding of the rights of the individuals composing it, this duplication of inquiries, extending sometimes to the threefold or fourfold repetition of the same facts. Nay, there is a danger greater than that of the possible escape from justice of an occasional criminal, in the general lowering of moral tone through the continual reiteration of the evidences of low, cunning, vicious habits, and debased lives, which go to make up the sensational crime paraded day by day through the medium of the Press. The depths of nausea have been touched in the notorious case which has just reached its predestined end, after running through all the gamut of horrors in its course from the Coroner's Court to the final hearing at the Old Bailey. Veterans in the administration of the law like Lord Lindley, Sir Edward Fry, and Sir Alfered Wills join with experts in criminal practice like Sir Harry Poland, Mr. Henry Dickens, K. C., and Mr. Mitchell-Innes, K. C., in denouncing the continuance of this old-fashioned procedure; and leading practitioners in both Coroners' and Magistrates' Courts, like Mr. Muskett, Mr. Newton, and Mr. Freke Palmer, repudiate the necessity for the duplicated inquiries. The Crippen case has focussed attention on the question, and the accumulation of authority which we have gathered from such varied sources ought to assist in putting into motion those in authority who can at once initiate with the assurance of the general support, the necessary changes in the law.—*Ibid.*

Spectacular Trials.—The scrupulous impartiality and unfailing dignity with which the Lord Chief Justice presided over the Crippen trial were entirely worthy of the high traditions of the Bench. Not less deserving of acknowledgment are the ability, fairness, and sense of responsibility with which both the prosecuting and defending counsel discharged their duties in one of the most remarkable cases ever tried at the Old Bailey. It is unfortunate that the arrangements made for the admission of the public to the Court were so incompatible with the solemnity of the proceedings. The issue of 'half-day' tickets to fashionably attired ladies tended to give an unpleasantly theatrical tone to the audience—a tendency which was certainly not lessened by the presence of not a few actors and actresses throughout the trial. What, however, is chiefly to be objected to, in the interest of the dignity of the administration of the law, is that many of these elegantly gowned ladies were accommodated with seats on the Bench. This use of the judgment seat for spectacular purposes was, we have reason to know, without the authority or approval of the Lord Chief Justice. The city authorities exercise a control over the arrangements at the Central Criminal Court with which a Judge cannot easily interfere. But it may be hoped that some measures will be taken to prevent the morbid curiosity of 'smart' people from reducing trials at the Old Baliey to the level of a melodramatic spectacle.—*Ibid.*

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The Matinee Hat Case and Public Policy.—It seems in these days as if the whole world were transformed, or rapidly being transformed, into a vast medium for advertisement. We have long got past all Sheridan's varieties of the puff—the puff direct, preliminary, collateral, collusive, and oblique. Art has begun to find its chief sphere in the pictorial poster, and law is now drawn into the vortex—witness the faked up case of the *matinee* hat. The plot of the little drama was this. Two ladies in the biggest of big *matinee* hats were to take their place in the stalls of the Prince of Wales Theatre; exactly behind them a gentleman was to be placed. On the ringing down of the curtain the gentleman was to appeal to the ladies to remove their hats. The ladies were to refuse. The manager, Mr. Curzon, was to be summoned. He was to insist on the ladies removing their hats

or quitting the theatre, and on their refusal a technical assault was to be committed for the purpose of ejecting them. Then there was to be case in the Police Court with all its attendant notoriety; and what better advertisement could a manager's heart desire? The little drama was duly played out, and then the ingenious author of it and his wife, who had acted a part in it, asked to be paid the sum agreed for their services—£100—and being denied, resorted to the County Court. There, in old language, they have just been non-suited by Judge Woodfall on the ground that the contract was void as against public policy, for two reasons: the ejection of the ladies might have provoked a breach of the peace by sympathisers; and the Police Court proceedings were a fraud on the administration of Justice. Neither reason seems quite satisfactory. 'Beauty in distress,' however it may have appealed to Spenser, does not move an ungallant age like ours. One after another the militant Suffragettes, having uttered their war-cry, are let out, undefended, unwept. Who will break the law to champion the *matinee* hat? The other point presents more difficulties. No doubt the collusion would have justified the Police Magistrate in summarily and severely dismissing the charge. But 'public policy,' as Mr. Justice Burroughs said long ago, 'is an unruly horse, and when once you get astride him you never know where he will carry you.'—*The Law Journal.*

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Order XIV.—Summonses and Affidavits.—Legal practitioners will do well to note the observations of Lord Justice Vaughan Williams last week in *Chirgwin* v. *Russell* on the practice of supporting applications for Judgments under Order XIV by the affidavits of persons who cannot speak of their own knowledge to the facts which they affirm on oath. In this case the affidavit was made by the plaintiff's solicitor, who did not state his means of knowledge, nor that he was authorised to make the affidavit. An objection to the affidavit on these grounds failed, because the defendant's own admissions showed that they had no defence. The learned Lord Justice, however, was careful to point out that the Court did not decide against the defendant's contention. He said that it was a wholesome rule that when an affidavit was sworn by a person other than the plaintiff he should

state his means of knowledge, and concluded with the remark that he would be sorry if any other rule of practice were laid down. This decision, therefore, does not in any way impugn the statement in the Annual Practice that the affidavit should be made by a person who can testify positively to the requisite facts, and that a paragraph should be added showing his means of knowledge.—*Ibid.*

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Disraeli and the Law.—The legal profession, which has supplied the country with so many statesmen of the highest rank missed by very little the distinction of numbering Disraeli among its members. At the age of seventeen the famous statesman entered a solicitor's office in Old Jewry, and it is pleasing to find, from the first volume of Mr. Monypenny's biography, that he could write of his life as an articled clerk : "It gave me great facility with my pen and no inconsiderable knowledge of human nature." Many years afterwards, when he had filled the office of Prime Minister, he alluded to his father's choice of a profession for him in these terms : "He was not happy, certainly, in the profession which he selected for me to follow, but it should be remembered, for his vindication, that I entered it under circumstances which would have rendered its pursuit a course to me of great worldly advantage." Disraeli's gifts were, obviously, of too dazzling an order to have enabled him to settle down to the discharge of the daily tasks of a solicitor, and characteristically enough, it was while "descending the waters" of the Rhine that he determined that he "would not be a lawyer." His connection with the law, however, did not cease when he abandoned his seat in the office in Old Jewry. He played the part of student in both branches of the profession. "Upon the petition of Benjamin Disraeli, Esq., a fellow of this Society, praying that his name may be taken off the Books, his health not permitting him to follow the profession of the law, it is ordered accordingly, on the usual terms." So runs an entry in the records of the Benchers of Lincoln's Inn made in 1832. Seven years later, by one of those coincidences which give piquancy to life, a similar entry was made by the Benchers of the same Inn in regard to Disraeli's great rival : "Upon the petition of William Ewart Gladstone, Esq., a Fellow of this Society, praying that his name be taken

off the Books, he having given up his intention of being called to the Bar, it is ordered accordingly." Who shall say how different would have been the history of the nation if these two great men had been rivals in the Courts instead of in the Senate :— *The Law Journal.*

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The "Black Cap."—A too sensitive critic of the proceedings in the Crippen case has included the donning of the "black cap" by the Lord Chief Justice in passing the sentence of death among the "hideous trappings and archaic formalities" which shocked his conscience as he witnessed the closing stages of the trial. We agree with Sir H. B. Poland in deprecating the use of such language in connection with a simple act which adds not a little to the impressiveness of so solemn an occasion. The exact origin of the black cap has been the subject of a good deal of controversy, though it may be regarded as certain that it is associated with the Order of the Coif. Lord Campbell, in his "Lives of Chief Justices," writes :—

"It was to conceal the want of the clerical tonsure that the Serjeants-at-Law, who soon monopolised the practice of the Court of Common Pleas, adopted the Coif, a black velvet cap, which became the badge of their order. * * In the middle of the seventeenth century the Common Law Judges adhered to their coifs, or black cloth caps, which they still put on when they pass sentence of death." Serjeant Pulling, much more trustworthy as an antiquary, denies emphatically, in his "Order of the Coif," that the black cap was the Coif. The real Coif, he explains, was originally a close fitting head-covering made of white lawn or silk ; and the black cap, he maintains, was expressly designed to veil the Coif on the only occasion on which it required to be hidden. Referring to the rule that the Coif was not to be removed by serjeants when sitting on the Bench, he writes :—

"This rule seems always to have been departed from in passing sentence of death. The head of the administrator of the law was then covered or veiled as a token of sorrow by the black sentence cap. The cornered caps are very distinctly spoken of by Dugdale as the head covering which the Judges and Serjeants then always used when attending church in state (at St.

Paul's or on circuit), or at the reading of the commission or presiding at the trial of prisoners. How generally the head was covered as a token of sorrow in Eastern countries may be proved by several passages in the Old Testament and the ecclesiastical character of our earliest judges and advocates makes it highly probable that Serjeant Pulling's explanation of the origin of the 'black cap' is the right one. It is safe, however, to say that it has long since come to be recognised, not merely as a token of sorrow on passing the death sentence, but as an emblem of the high authority which the Judges exercise. Even in Dugdale's time, as serjeant Pulling does not fail to notice, the Judges 'sat at Paul's with their caps at the sermon,' and wore their 'coyfs and cornered caps' at the reading of the commissions. On neither of these occasions could there have been any fitting reason for feelings of sorrow. The Lord Chief Justice always wears his black cap in receiving the Lord Mayor at the Royal Courts of Justice, and on all State occasions, such as the reopening of Parliament, the Judges carry their black caps, as part of their official costume."—*Ibid.*

BOOK REVIEWS.

The Digest of the Law of Discovery with Practical Notes: By His Honour JUDGE BRAY. 2nd Edition. Published by Messrs. Sweet & Maxwell and Stevens & Sons, London. Price 3*s* 6*d* net.

JUDGE BRAY has rendered a distinct service to the Profession, in issuing a second edition of his useful Digest of the Law of Discovery. Part I of the book contains a concise statement of the Law of Discovery and it is followed by Part II which contains the Orders and Rules of the English Practice on the subject with succinct and yet exhaustive notes with reference to decided cases bearing on them. O. 11 of the new Civil Procedure Code corresponds to O. 31 of the English Rules of Practice, and the commenaries and notes contained in the book with reference to the latter will prove very useful as a commentary on the corresponding O. 11 of the Procedure Code in India. A second edition of the book was a long-felt want, and we are sure that the Profession both in England and India will welcome the new edition.

The Government of India: Supplementary Chapter (India Councils Act, 1909): By SIR COURTNEY ILBERT, K.C.B., K.C.S.I. Published by the Clarendon Press, London and New York. Price 1s.

We congratulate the Clarendon Press on the timely issue of this book. The book contains a short summary of the Councils Act by the author, Sir Courtney Ilbert, and the Act itself with the Rules made under it form Appendices I to III. The book is sure to be useful to all members of Legislative Councils and to students of the Constitutional History of India, and we may say that the former cannot do without it. The book is moderately priced and we hope all the members of Legislative Councils and students of Constitutional History will possess themselves with a copy of this handy volume.

The *Catechism of the Indian Evidence Act,* embodying the questions set for the Mysore Local Service and Pleaders' Examinations for several years, with answers to them. By B. M. Rungiah Naidu :—We hope this book will be of use to examiners and examinees on the subject.

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We beg to acknowledge receipt of the following publications :—

Digest of the Law of Discovery with Practical Notes by Judge Bray : 2nd Edition, Published by Messrs. Sweet & Maxwell, Ltd., 5 Chancery Lane, London, W. C.

The Government of India, Supplementary Chapter (Indian Councils Act, 1909) by Sir Courtney Ilbert. Published by the Clarendon Press, London.

Allahabad Law Journal for	November 1910.
Bombay Law Reporter	Do.
Burma Law Reporter	Do.
Calcutta Law Journal	Do.
Calcutta Weekly Notes	Do.
Canada Law Journal	Do.
Canada Law Times	Do.
Central Law Journal	Do
Chicago Legal News	Do.
Criminal Law Journal	Do.
Green Bag	Do.
Harvard Law Review	Do.
Hindustan Review	Do.
Kathiawar Law Reports	Do.
Law Magazine and Review	Do.
Law Notes	Do.
Law Students' Helper	Do.
Law Students' Journal	Do.
Michigan Law Review	Do.
Police Service Magazine	Do.
Punjab Law Reporter	Do.
The Law Journal	Do.
The Lawyer	Do